No. 77-600

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

LANSING BOARD OF EDUCATION, a Body Corporate; and Members of the LANSING BOARD OF EDUCATION; viz., VERNON D. EBERSOLE, CLARE D. HARRINGTON, MICHAEL F. WALSH, RAY A. HANNULA, JOAN HESS, J. C. WILLIAMS, BRUCE ANGELL, JOSEPH E. HOBRLA and MAX D. SHUNK,

Petitioners,

vs.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Lansing Branch; CYNTHIA TAYLOR, JUDITH TAYLOR and ANDREA TAYLOR, by Their Father and Next Friend, JAMES R. TAYLOR; MELINDA LEA HEDLEY, CHRISTINE MICHELE HEDLEY, DOUGLAS JOHN HEDLEY and DANIEL JOSEPH HEDLEY, by Their Mother, and Next Friend, JOAN L. HEDLEY; PETER MILLER and ELIZABETH MILLER, by Their Father and Next Friend, CHARLES MILLER; FRANK J. PENNONI and JAMES PENNONI, by Their Mother and Next Friend, KATHLEEN PENNONI; and DAVID KRON and LISA KRON, by Their Father and Next Friend, WALTER V. KRON,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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CITATIONS

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit affirming the District Court's finding of *de jure* segregation and the District Court's granting of a permanent injunction is reported at 559 F.2d 1042 (6th Cir. 1977).

The District Court's opinion on liability is reported at 429 F. Supp. 583 (W.D. Mich. 1976).

Unreported decisions include the Preliminary Injunction issued by the District Court granted August 10, 1973 (Pet. App. 1-40), aff'd 485 F.2d 569 (6th Cir. 1973), and the Court of Appeals opinion denying application for stay (Pet. App. 41-43).

JURISDICTION

The judgment of the Court of Appeals was rendered on July 26, 1977. The Petition for a Writ of Certiorari was filed on October 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Courts Below, Following a Finding of *De Jure* Segregation in the Lansing School System, Correctly Adopted and Applied the Legal Standards Relating to the School Board's Affirmative Duty to Correct Said Segregated Condition.

2. Whether the Court of Appeals Erred in Affirming the District Court's Employment of "the Natural and Foreseeable Consequences" Test as an Indicium of Segregative Intent.

3. Whether the Court of Appeals Erred When It Found the Defendant's Discriminatory Actions and Omissions Contributed to and Resulted in a Condition of *De Jure* Segregation within the Lansing School District.

4. Whether the Court of Appeals Erred in Affirming the Desegregation Plan Adopted by the District Court.

5. Whether the Courts Below Erred in Finding the Effects of the Segregative Act of the Lansing School Board Warranted Judicial Intervention.

STATEMENT OF THE CASE

This is a school desegregation action against the Lansing Board of Education of Lansing, Michigan. In almost every particular it parallels the case of *Oliver* v. *Kalamazoo Board of Education,* 368 F. Supp. 143 (W.D. Mich. 1973) aff'd 508 F.2d 178 (6th Cir. 1974) cert. denied, 421 U.S. 963 (1975).

On December 19, 1975 the District Court held that the Lansing school system was segregated *de jure.* This holding was firmly based upon extensive findings concerning the school board's actions with respect to assignment of faculty (Pet. App. 84-88), gerrymandering of attendance zone boundaries (Pet. App. 66-67), discriminatory transfer policies (Pet. App. 68-78), deployment of mobile classrooms (Pet. App. 76-78), physical conditions and facilities (Pet. App. 78-84), construction and location of new schools (Pet. App. 120-123), one-way busing (Pet. App. 115-120), and rescission of an existing and operating "cluster plan" (Pet. App. 112-115). The Court of Appeals concluded that the District Court did not commit error in its finding of purposeful *de jure* segregation. Further, they concluded that the "requisite segregative intent or purpose for a finding of constitutional violation is readily inferable. . . ." from the above mentioned acts (Pet. App. 184).

On the question of relief, the District Court embodied in its decree a desegregation plan devised by the administration of the Lansing school system. Said plan was a slightly modified version of the one originally devised by the recalled school board and fully implemented by the school administration. (Said original plan having been rescinded by the school board midway through the school year and reinstated pursuant to the District Court's Preliminary Injunction). The school system has been operating on a fully desegregated basis pursuant to these plans for five (5) years.

ARGUMENT

The decision of the courts below are correct and further review is not warranted.

1. The Petitioners assert that the courts below erred in holding that there was an affirmative obligation to desegregate absent constitutional violations. Such was not the holding of the District Court or the Court of Appeals.

This very point was specifically addressed by the Court of Appeals wherein it held that,

> ". . . Appellees claim that the District Court erred in holding that the school board had an affirmative duty to desegregate the elementary schools. . . .
>
> The Constitution imposes no duty on school officials to correct segregative conditions resulting from factors over which they have no control, such as residential patterns, and the failure to anticipate the effect on racial composition of the schools of adherence to a neighborhood school policy does not signify that a school board has created a dual system, absent a showing of segregative intent." (Pet. App. 169-170)

The Court of Appeals held that the State assumes an affirmative duty only when ". . . school authorities have carried out a systematic program of segregation affecting a substantial portion of students, schools, teachers, and facilities within the school system . . .", and specifically relied upon the mandate of *Keyes* v. *School District No. 1,* 413 U.S. 189 at 201 (1973).

The District Court found numerous constitutional violations which impelled such an affirmative duty. The Court of Appeals noted and affirmed these constitutional violations, specifically the policies of the school board relating

not only to attendance boundaries, but medical transfers, mobile units, maintenance of physical facilities, one way busing of black children, faculty hiring and assignments, construction and use of new elementary schools, and rescission of the cluster plan.

The standard adopted and applied by the courts below, reflect firm adherence to the decisions of this Court. See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), and *Oliver* v. *Kalamazoo Board of Education,* 368 F. Supp. 143 (W.D. Mich. 1973) aff'd 508 F.2d 178 (6th Cir. 1974) cert. denied, 421 U.S. 963 (1975).

2. The courts below correctly adopted and carefully applied the principles governing "intent" as set forth by this Court in *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973); *United States* v. *Texas Education Agency,* 532 F.2d 380 (5th Cir. 1976) vacated and remanded 429 U.S. 990 (1976); *Washington, Mayor of Washington D.C.* v. *Davis,* 426 U.S. 229 (1976), and *Dayton Board of Education* v. *Brinkman,* 97 S. Ct. 2766 (1977). Petitioners apparently assert that there has been a significant misapplication of the *Keyes* requirement of segregative intent and that courts may no longer take cognizance of the "natural and foreseeable consequences" of a school board's actions and omissions when seeking to determine "intent". Respondents disagree. Unlike the situation in *United States* v. *Texas Education Agency,* 532 F.2d 380 (5th Cir. 1976), vacated and remanded, 429 U.S. 990 (1976), [which was essentially a remedy case], wherein the Court of Appeals gave controlling effect to the simple use of neighborhood schools and applied the tort liability principles, without looking for specific intent, the courts below carefully and meticulously adhered to the specific intent requirement of *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), and *Washington, Mayor of Washington D.C.* v. *Davis,* 426 U.S. 229 (1976).

The courts below recognizing that the specific intent requirement had to be met, stated

> "A finding of *de jure* segregation requires a showing of three elements: (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increase or continued segregation." (Pet. App. 54, 165)

The Court of Appeals then concluded that the requisite segregative intent or purpose for a finding of constitutional violation is readily inferable, not from the simple use of neighborhood schools or simple racial imbalance but,

> ". . . from the gerrymandering of attendance zone boundaries, the granting of special transfers from minority to majority schools, the use of mobile units under circumstances which enhance the racial identifiability of schools, the one-way busing of minority students, the discriminatory assignment of minority faculty and administrators, the relative inferiority of facilities at minority schools, the rescission of the cluster-school desegregation plan, and the choice of location of the new Vivian Riddle School coupled with the decision to operate it as a neighborhood school so that it is certain to open as a segregated facility. . . ." (Pet. App. 184)

This case is also distinguishable from *Dayton Board of Education* v. *Brinkman,* 97 S. Ct. 2766 (1977) likewise, and in *Washington, Mayor of Washington D.C.* v. *Davis,* 426 U.S. 229 (1976), wherein the lower courts had relied upon simple racial imbalance and failed to demand that discriminatory intent so religiously demanded and found herein.

We do not deny that the courts below did consider the natural, probable, and foreseeable consequences of the school board's acts and omissions, singularly and in their totality, in ascertaining intent. At no time, however, has this Court taken the position that the various discrimina-

tory acts and the consequences of such acts of a public body are irrelevant in making such a determination, the cases cited above notwithstanding. As Justice Stevens stated in his concurring opinion in *Dayton Board of Education* v. *Brinkman,* 97 S. Ct. 2766 (1977)

> "the relevant finding of intent in a case of this kind necessarily depends primarily on objective evidence concerning the effect of the Board's actions rather than the subjective motivation on one or more members of the Board; see Washington v. Davis, 426 U.S. 229, 253-254."

3. The courts below took full cognizance of the effect and results of the various discriminatory acts of the Lansing Board of Education. Contrary to the assertions of Petitioners, the courts below carefully followed the mandate of *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973) concerning increased or continued segregative "results" noting that the (1) boundary line gerrymandering "had the foreseeable effect of increasing the racial identifiability of Michigan Avenue School" (Pet. App. 171), and accelerating segregation at "white Verlinden School" (Pet. App. 172); (2) transfer policy "was abused in a way which contributed to the segregative conditions in these [Main, Michigan and Verlinden] schools" (Pet. App. 174); (3) mobile unit policy had an effect on the composition of Main, Verlinden, Walnut and Barnes Schools, ". . . earmarking (them) according to their racial composition" (Pet. App. 174-175). The discriminatory results or contemplated results were also noted with respect to the Board rescission (Pet. App. 180) and the site selection on the Vivian Riddle School (Pet. App. 182).

These constitutional violations then noted in conjunction with the enrollment statistics (Pet. App. 180) available at trial convincingly demonstrate that the courts below did

not deviate from this Court's mandate concerning "segregative results".

4. The remedy imposed by the District Court is a modest one involving only grades one (1) through six (6), at a limited number of schools. It was designed by the Superintendent and the administrative staff of the Lansing School District. Cross-district busing is not involved. It was designed and implemented to correct the results of the Board's discriminatory acts and the injunction prohibiting its rescission was properly held to comply with the guidelines in *Dayton Board of Education* v. *Brinkman,* 97 S. Ct. 2766 (1977) (Pet. App. 184).

5. In light of the pervasiveness of the Board's numerous constitutional violations, discussed heretofore, and the Board's continued insistence to resegregate the Lansing School system through rescission (Pet. App. 181) and the construction and maintenance of the new (not completed at the time of trial) segregated elementary school facility (Pet. App. 182), judicial intervention was not only warranted, but mandated.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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